III. PREMATURE REGULATION OF ITV WILL HARM CONSUMERS BY DAMPENING INVESTMENT IN INNOVATIVE ITV SERVICES.

A. Government Regulation Would Stifle ITV Investment and Innovation, Particularly at a Time when Many Companies Have Yet to See Returns on Their Substantial ITV Investments.

As discussed above, ITV service providers are struggling to find a successful business model for ITV services. Some ITV ventures, like "Your Choice TV," have failed, while others have seen only modest returns on their investments.[102] For example, AOLTV announced its ITV service last June but to date has been limited in its ability to deploy its service on a large scale.

Government regulation of ITV would threaten continued investment in this burgeoning industry, particularly at this critical time when ITV providers must continue to expend considerable resources in upgrading infrastructure, developing new services, and experimenting with business models.[103] Given the embryonic and highly dynamic nature of the ITV industry, such investments are very risky and lack any guaranteed return. Indeed, recently the flow of investment has ebbed due to delays in ITV deployments caused by economic uncertainties and the slump in technology stocks.[104] Given the state of the market today, government regulations -- or even *proposed* regulations -- would cause investors to be even less willing to risk the millions and, potentially, billions of dollars necessary to build out networks and deploy new ITV

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[102] *See, e.g.*, Emelie Rutherford, *Interactive TV Not Ready for Prime Time*, CIO.com, Jan. 31, 2001 ("Interactive TV's growth has been sluggish, increasing only from 800,000 subscribers in the beginning of 1999 to 1.1 million at the end of 2000, according to Standard Media International, the company that produces *The Industry Standard* magazine."), *available at* http://www.cio.com/news/013101_poll.html.

[103] *See* IDC Report, *supra* note 4, at 109 (noting that investments in upgrading infrastructure "must continue if we are to see interactive services become a reality for mainstream consumers").

[104] *See* Ausnit, *supra* note 14, at 33 (emphasis added) ("A lot of recent technology investing is an effort to anticipate or follow existing momentum. At the moment, due to disappointments, there is very little momentum in the interactive TV sector, and consequently very little new capital is going into the sector.").

services.[105] As one leading industry observer noted: "[W]hen legal uncertainties erupt, people with money to spend for content and enabling technology freak."[106]

B. The Commission Has Repeatedly Recognized the Risks of Premature Regulation of Highly Dynamic and Innovative Businesses.

The Commission has exercised extreme caution when considering possible regulation of broadband-related services. As Chairman Powell noted recently in the AOL-Time Warner proceeding, "it is hubris to believe that regulators can (better than businesses) craft the optimal terms and conditions to govern the fundamental rules for market operation, *particularly where innovation is at a premium and new and novel technologies are at stake.*"[107] Rather, the Commission has generally avoided regulating in such cases for fear of stifling the very investments, innovation, and technological advances that benefit consumers. As the Cable Services Bureau aptly concluded in its report, *Broadband Today*, regulating "before fuller development of the broadband industry would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry."[108]

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[105] *See id.* at 123 ("Service providers are also working through issues related to use of their bandwidth [and] must allocate their in-band and out-of-band capacity as well as prioritize investments in infrastructure and marketing. Changes in corporate priorities or government regulations could affect the market timing.").

[106] Shaw, *supra* note 20 (paraphrasing statement of Tracy Swedlow, president of InteractiveTV Today).

[107] *Powell Separate Statement* at 14 (emphasis added); *see also In re Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, Third Rep. & Order & Fourth Further NPRM, 15 FCC Rcd. 3696 at ¶ 316 (1999) (noting that in a "dynamic and evolving market, regulatory restraint . . . may be the most prudent course of action"); *In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, Rept., 14 FCC Rcd. 2398 at ¶ 74 (1999) ("*First Enhanced Services Report*") ("[W]e need to be particularly careful about any action we take to promote broadband deployment, given the nascent nature of the residential market for broadband.").

[108] Cable Servs. Bureau, *Broadband Today*, Report No. CS 99-14, at 46 (Oct. 19999), *available at* http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf.

It is precisely these concerns that prompted the Commission to refrain from regulating cable modem services.[109] In four separate decisions, the Commission recognized, as noted by Chairman Powell, that "competition and the free market, *as opposed to burdensome regulation*, will ultimately prove to be the best means for achieving the widespread deployment [of advanced services] that Congress envisioned."[110]

Such a market-based approach is also strongly supported by economists analyzing the effect of premature government intervention in highly dynamic industries.[111] As economic studies have made plain, in a marketplace in which technology is constantly reshaping the competitive landscape and the entry of new providers and service offerings force existing participants to alter business models in response, government regulation is particularly inappropriate.[112] This is so because in a nascent, competitive market where the technology

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[109] *See In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, Second Rept., 15 FCC Rcd. 20913 (2000); *First Enhanced Services Report*; *AT&T-MediaOne Merger Order*, 15 FCC Rcd. 9816 (2000); *AT&T-TCI Merger Order*, 14 FCC Rcd. 3160 (1999).

[110] *First Enhanced Services Report*, 14 FCC Rcd. at 2466 (Statement of Commissioner Michael K. Powell) (emphasis added).

[111] *See, e.g.*, Declaration of Janusz A. Ordover & Robert D. Willig, Attachment to AT&T Comments, filed in GN Dkt. No. 00-185, app. A at ¶¶ 11, 24 (Dec. 1, 2000) ("Ordover/Willig Decl.").

[112] *Id.* at ¶ 11. This conclusion is supported by economic literature regarding the inadvisability of premature government intervention in the development of standards for highly dynamic industries. *See, e.g.*, Stanley M. Besen & Leland L. Johnson, *Compatibility Standards, Competition, and Innovation in the Broadcasting Industry*, Rand Corporation, Nov. 1986, at 135 ("[T]he government should refrain from attempting to mandate or evaluate standards when the technologies themselves are subject to rapid change."); *EIA and TIA White Paper on National Information Infrastructure*, 1994, at 9 ("In areas of rapidly changing technology, premature adoption of a standard can impede innovation."); *The Information Marketplace: The Perspective of the Software and Computer Industry*, Special Focus Paper, Spring 1995, at 11 ("[S]etting standards too early in the development of the information marketplace would lock us into technologies which ultimately will retard the efficient evolution and use of these networks."); Peter Pitsch & David C. Murray, The Competitiveness Center of the Hudson Institute, *A New Vision for Digital Telecommunications*, Briefing Paper No. 171, Indianapolis, Ind., Dec. 1994, at 2 ("[G]overnment is ill-equipped to regulate tightly a fast-paced environment characterized by rapid technological change and continuous innovation in services. If it tries, its efforts will almost certainly backfire.").

remains unsettled, and consumer demand and the costs of supplying it change frequently, government intervention: (1) will delay or destroy possible marketplace solutions to any potential impediments to competition; (2) could result in adoption of inferior "solutions" due to inadequate familiarity with the actual needs of the economic actors and consumers and with the technologies and options available; and (3) might force competitors to adopt specific technologies and business strategies, even where alternatives may better meet the needs of market participants.[113]

As shown above, ITV services are developing in precisely such a marketplace in which consumer preferences are unknown, technology is rapidly evolving, and viable business models have yet to be proven. Accordingly, premature government regulation of ITV risks stifling continued investment, thereby harming consumers by delaying or derailing the creation and deployment of innovative ITV services.

IV. REGULATION OF ITV WOULD CONFLICT WITH THE COMMUNICATIONS ACT AND COMMISSION POLICY AND PRECEDENT.

A. Even if the Commission Decides to Classify ITV for Regulatory Purposes, It Lacks Authority to Impose the Non-Discriminatory Conditions Discussed in the Notice Because ITV Is a Cable Service or an Information Service, but Not a Telecommunications Service.

As the foregoing discussion demonstrates, it is not even clear what ITV services will become commercially available and viable. Consequently, the Commission's invitation for comment on possible regulatory definitions or classifications of ITV at this point is premature.[114] As Chairman Powell cautioned in the AOL-Time Warner proceeding, "[w]ithout a clear product,

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[113] Ordover/Willig Decl. at 11-12 ¶¶ 23-24 (discussing the detrimental effects premature government intervention could have on market participants' choice of technologies and business models).

[114] *See Notice* at ¶¶ 44-50.

[the Commission] cannot define a product market, nor can [the Commission] assess the competitiveness of that market."[115] In such circumstances, the Commission should continue to trust the marketplace to determine how the emerging ITV platforms and services should be developed and deployed.[116] However, if the Commission were to proceed with classifying ITV, it must conclude that: (1) ITV is at most a cable service -- when provided by a cable system operator -- or an information service, but not a telecommunications service; and (2) the Commission is, therefore, prohibited under the Communications Act from imposing common-carrier like regulations on cable operators' ITV service offerings, such as non-discriminatory access requirements.

AT&T, NCTA, and others have demonstrated previously in their comments in the Commission's forced access proceeding that Internet access-type services are cable services or information services, but not telecommunications services.[117] With respect to ITV services provided by cable system operators that are likely to have a traditional video programming component, the case is even stronger for classification as a cable service or an information service but not a telecommunications service. As video programming plus interactive enhancements, these services fall squarely within the definition of "cable service" expanded by

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[115] *Powell Separate Statement* at 11.

[116] *See id.* at 14 ("The beauty of market mechanisms has always been that the give and take among competitors and consumers produces an optimal set of terms and conditions.").

[117] *See* AT&T Forced Access Comments at 7-36; AT&T Reply Comments, filed in GN Dkt. No. 00-185, at 28-42 (Jan. 10, 2001) ("AT&T Forced Access Reply Comments"); NCTA Comments, filed in GN Dkt. No. 00-185, at 5-39 (Dec. 1, 2000).

the 1996 Act.[118] And all of the ITV services mentioned in the *Notice* also fit under the "other programming services" prong of the cable service definition because they constitute "information that a cable operator makes available to all subscribers generally,"[119] and also qualify as "information services" because they make available information to subscribers "via telecommunications."

However, none of the types of ITV services described in the *Notice* can reasonably be classified as "telecommunications services. "Telecommunications" is the "transmission, between or among points specified by the user, or information of the *user's* choosing, without change in the form or content of the information as sent and received."[120] "Telecommunications services" are "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used."[121] As the Commission and the courts have long recognized, "telecommunications services" provide

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[118] *See* 47 U.S.C § 522(6) (defining "cable service" as "(A) the one way transmission to subscribers of (i) *video programming or* (ii) other programming services *and* (B) *subscriber interaction*, if any, which is required for the selection *or use* of such video or other programming service") (emphasis added). The 1996 amendment to the Communications Act expanded the definition of cable services. As broadened, the definition includes instances in which the "subscriber interaction" with the information is for the "use" of the information rather than simply its "selection" (such as the playing of a computer game rather than the choosing of which game to play). The Conference Report stated that the intent of the amendment is "to reflect the evolution of cable to include *interactive services* such as game channels and information services, as well as enhanced services." H.R. Rep. No. 104-458, at 169 (1996) (emphasis added). Congress' broadening the definition of "cable service" in the 1996 Act to include interactive services means that such interactive services cannot be subject "to the traditional common carrier requirements of servicing all customers indifferently upon request" -- the basic common carrier non-discrimination requirement. *See* H.R. Rep. No. 98-934, at 60 (1984) ("1984 House Report")

[119] 47 U.S.C. § 522(14). *See* AT&T Forced Access Reply Comments at 31-32 (noting that the definition of "other programming service" requires merely that the cable operator "make[] available" the information to subscribers, and if subscribers can choose whether or not to access the information, then the information has been "made available" to them).

[120] 47 U.S.C. § 153(43) (defining "telecommunications") (emphasis added).

[121] *Id.* § 153(46) (defining "telecommunications service").

customers with a pure transmission conduit without *any* accompanying information.[122] Because cable ITV services undeniably include information of the cable operator's choosing, they simply cannot be telecommunications services.[123]

Since ITV is, at most, a cable service and an information service but not a telecommunications service, Sections 621(c) and 624(f) of the Act, and existing Commission regulations, prohibit the Commission from imposing common-carrier like regulations (such as non-discriminatory access requirements) on cable operators' ITV service offerings or from regulating the provision or content of such services, except as expressly provided in Title VI of the Act. Section 621(c) provides that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service,"[124] and Section 624(f) provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."[125] As federal courts have held, these provisions bar the imposition of any access obligations other than the must-carry, leased access, and related obligations that are expressly imposed by Sections

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[122] *See, e.g., California v. FCC*, 905 F.2d 1217, 1223, n.3 (9th Cir. 1990); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision,77 FCC 2d 384 at ¶¶ 5, 94 (1980).

[123] *See* AT&T Forced Access Comments at 22 (noting that the Commission concluded in its 1998 *Report to Congress*, "the categories of 'telecommunications service' and 'information service' in the amended Communications Act are mutually exclusive") (citing *Report to Congress*, 13 FCC Rcd. 11501, at ¶ 39 (1998)).

[124] 47 U.S.C. § 541(c). The legislative history accompanying Section 621(c) makes clear that Congress intended to preclude the imposition on a cable operator of "the traditional common carrier requirement of servicing all customers indifferently upon request." 1984 House Report at 60. Moreover, the Senate version of the bill that ultimately became the 1996 Act specifically was amended to make clear that cable operators are not engaged in the provision of "telecommunications service" to the extent they provide cable services. *See* 141 Cong. Rec. S7996 (June 8, 1995) (Statement of Sen. Larry Pressler).

[125] *Id.* § 544(f)(1).

611, 612, 614, and 615 of the Communications Act.[126] Similarly, as information services, ITV services are immune from unbundling and access obligations under the Commission's *Computer III* rules, particularly because, as shown, cable operators do not control bottleneck facilities for the provision of such services.

Finally, any regulations that single out cable operators for special obligations relative to ITV content providers trigger heightened scrutiny under the First Amendment.[127] Consequently, as underscored by the D.C. Circuit's recent decision in *Time Warner Entertainment v. FCC*, the Commission may only impose such regulations based on substantial record evidence of anti-competitive behavior by cable operators.[128] As the foregoing analysis has demonstrated, there is

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[126] *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994); *Comcast Cablevision v. Broward County*, No. 99-6934-CIV, slip. op. at 11-12 (S.D. Fla. Nov. 8, 2000) ("*Broward County*"). By its plain terms, Section 624(f) applies to rules regarding the "content" *or* "provision" of cable services. The Commission has previously relied on the D.C. Circuit's decision in *United Video* in an attempt to read the "provision" language out of the statute. *See In re Implementation of Video Description of Video Programming*, Rep. & Order, 15 FCC Rcd. 15230 at ¶ 61 (2000) ("*Video Description Order*") ("[The *United Video* court] has interpreted [Section 624(f)] to forbid 'rules requiring cable companies to carry particular programming'"). *See also In re Carriage of Digital Television Broadcast Signals*, First Rept. & Order & Further NPRM, CS Dkt. No. 98-120, FCC 01-22 at ¶ 16 (rel. Jan. 23, 2001) ("*Digital Must Carry Order*") ("[Section 624(f) forbids Federal agencies and others from requiring the content of cable services except as expressly provided for in Title VI."). While, as Commissioner Furchtgott-Roth has noted, the decision in *United Video* included dicta on the overall effect of Section 624(f), "the case did not squarely address, and no party appeared to argue, the meaning of the *provision* prong of the statutory language." *Video Description Order*, 15 FCC Rcd. at 15269 n.3 (Statement of Commissioner Harold W. Furchtgott-Roth) (emphasis added). In any event, rules of statutory construction require the Commission to give effect to every word in the statute, including the bar on rules relating to the *provision* of cable service. *See* 2A *Sutherland Statutory Construction* § 46:06 (2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.").

[127] *See* Notice at ¶ 53 (inviting comment on constitutional implications of non-discrimination proposals). *See also Turner Broad. System, Inc. v. FCC*, 520 U.S. 180 (1997); *Broward County* at 2 (holding that forced access requirement violates the First Amendment).

[128] *See Time Warner Entertainment*, No. 94-1035, 2001 U.S. App. LEXIS 3102 (D.C. Mar. 2, 2001), at *20 ("Time Warner Entertainment") (noting that "*Turner I* demands that the FCC do more than 'simply posit the existence of the disease sought to be cured,'" but rather "requires that the FCC draw 'reasonable inferences based on substantial evidence'") (citations omitted). The D.C. Circuit rejected the Commission's horizontal ownership limits for this very reason. *See id.* at *33 (concluding that "the Commission has pointed to nothing in the record supporting a non-conjectural risk of anti-competitive behavior, either by collusion or other means").

simply *no* such evidence to support regulation of ITV. Moreover, contrary to the suggestions in the *Notice*,[129] the Commission cannot impose ITV regulations based merely on the congressional findings in the 1992 Cable Act regarding a perceived risk at that time to non-affiliated video programmers, but rather must base its determination upon a comprehensive examination of existing industry conditions. The court in *Time Warner Entertainment* overturned the Commission's channel occupancy rules precisely because of such misplaced reliance on Congressional findings.[130]

B. The FCC May Not Regulate ITV Under the 70/70 Provisions of Section 612(g).

The Commission asks whether Section 612(g) of the Communications Act provides the Commission with the necessary authority to regulate ITV.[131] As an initial matter, the 70/70 benchmarks in the statute have not been met, and appear unlikely to be met in the foreseeable future given the steady growth of new competitors in the MVPD marketplace.[132]

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[129] *See* Notice at ¶ 2 ("If the same factual predicates that Congress cited in the 1992 Cable Act were to apply to a distribution platform delivering ITV services, then some regulation of those distribution facilities might be warranted.").

[130] *See Time Warner Entertainment* at *37 In fact, the Court noted that previous Commission findings relative to the video programming market argued *against* adoption of the channel occupancy rules. *See id.* at *37-42 (noting, among other things, Commission findings that: (1) "none of the top five MSOs 'showed a pattern' of favoring their affiliates;" (2) the proportion of vertically integrated channels continues to decline; and (3) reliance on affiliated programming "may threaten a competitive firm's very survival") (citations omitted). Moreover, relying on the findings in the 1992 Act is inappropriate given the substantial changes in the MVPD marketplace that have occurred over the last decade. Most importantly, in contrast to the situation in 1992, approximately 19 million consumers subscribe to cable's competitors, *see* Kagan Media Index, Jan. 31, 2001, at 7, and the FCC recently concluded that DBS, which is available to virtually every home in America, "is a substitute for cable services." *FCC Report on Cable Industry Prices*, MM Docket No. 92-266 FCC 01-49, at ¶ 53 (released February 14, 2001).

[131] *See Notice* at ¶ 51.

[132] *See* NCTA Comments, filed in CS Dkt. No. 00-132, at 32 (Sept. 8, 2000) ("NCTA Video Competition Comments") ("While it is true that cable systems with 36 or more channels are available to far more than 70% of households within the United States, the penetration rate for those systems is only 65.5%.").

Moreover, even assuming the 70/70 threshold had been crossed, the legislative history accompanying Section 612(g) makes clear that the provision applies solely to modifications to the *leased access* requirements set forth in the statute, and, consequently, cannot form an independent basis for regulating ITV.[133] The legislative history is replete with references to leased access, noting, for example, that Congress granted the Commission authority under Section 612(g) "to promulgate any additional rules necessary to assure that *leased access channels* provide as wide as possible a diversity of information sources to the public" and stating further that Congress noted that future developments in the cable industry and "programming industry desires for pursuing *leased access* opportunities" might in time necessitate "new and different requirements relating to *leased access*."[134] As the Commission held in its *IVI* decision, leased access is not available to services beyond video programming.[135] Because ITV enhancements cannot be classified as video programming and since many ITV services are not even related to a video stream, the leased access provisions of the Communications Act are not a basis for regulating in this area.

Finally, the Commission *already* has satisfied the objectives of Section 612(g) by substantially revising its leased access rules over the last several years. Most recently, in an order issued in February 1997, the Commission modified the rules relating to, among other things, rates, the selection of leased access programmers for cable systems at and below

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[133] NCTA Video Competition Comments at 32-34; AT&T Reply Comments, filed in CS Dkt. No. 00-132, at 2-3 (Sept. 29, 2000) ("AT&T Video Competition Reply Comments").

[134] 1984 House Report at 54 (emphasis added).

[135] *See In re Internet Ventures, Inc., Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet Serv. Providers Are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, MO&O, 15 FCC Rcd. 3247, at ¶ 13 (2000).

maximum channel capacity, tier and channel placement, and the procedures for dispute resolution.[136] The Commission also adopted orders in 1993 and 1996 implementing leased access reforms included in the 1992 Cable Act.[137] In short, the Commission already has made in these orders the very types of changes in its leased access rules that Congress had in mind when it enacted Section 612(g), including lowering leased access rates and streamlining the dispute resolution process.[138] Therefore, it is not necessary for the Commission to take any further steps under Section 612(g) should the 70/70 threshold ever be crossed.

C. The Commission Should Not Address Whether ITV Services Are "Program Related" Under Sections 614 and 615 Because It Is Considering that Issue in the Digital Must-Carry Proceeding.

The Commission invites comment on whether certain ITV services should be considered "program-related" in the context of must-carry signals under Sections 614 and 615 of the Communications Act.[139] The Commission addressed this issue in its recent digital must-carry

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[136] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, 2d Rept. & Order & 2d Order on Recon., 12 FCC Rcd. 5267 at ¶ 7 (1997).

[137] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Rept. & Order & Further NPRM, 8 FCC Rcd. 5631 (1993) (adopting, among other things, the "highest implicit fee" formula and various standards governing access terms and conditions); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access*, Order on Recon. & Further NPRM, 11 FCC Rcd. 16933 (1996) (revising the formula for calculating leased access rates).

[138] The changes effected by these orders track those mentioned by Congress in the legislative history accompanying Section 612(g), namely providing "additional procedures for the resolution of disputes" and "rules or new standards for the establishment of rates, terms and conditions of access." 1984 House Report at 54.

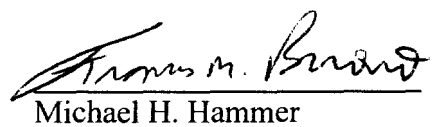
[139] *See Notice* at ¶ 52.

order,[140] and has also sought additional comments on the matter in the further notice of proposed rulemaking in that docket.[141] Thus, the Commission need not address the issue here.

V. CONCLUSION

For the foregoing reasons, AT&T respectfully urges the Commission to refrain from proposing, much less adopting, any ITV regulations in this proceeding.

Respectfully submitted,



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[140] *See Digital Must Carry Order at* ¶¶ 60-61 (noting, among other things, that "the carriage of [a broadcaster's] internet offerings by a cable operator likely would not be required under the must carry provisions unless the broadcaster can demonstrate that such material should be considered program-related").

[141] *See id.* at ¶ 122 (inviting comment on the "proper scope of program-related in the digital context").